Office - Supreme Court, U.S.
FILED
SEP 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2366

Supreme Court of the United States

October Term, 1981

EFRAIN FIGUEREDO, et al.,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent.

PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' REPLY BRIEF

RICHARD KANNER
(*Counsel of Record*)
777 Brickell Avenue
Miami, Florida 33131
Attorney for Petitioners

R. L. MIDKIFF, INC., 906 Cherry Street, Kansas City, Mo. 64106, (816) 421-0090

No. 81-2366

Supreme Court of the United States

October Term, 1981

EFRAIN FIGUEREDO, et al.,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent.

PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' REPLY BRIEF

FLUCTUATING HOURS AND DAILY WAGE DISPROVED AT TRIAL

The district court is not bashful in declaring its opinion conflicts with every known opinion on the "actual facts" issue (409 So.2d at 495, App. 20).

It is true that the "actual facts" test was applied in Aaron, as in most, if not all, other instances to in-

> crease the return to employees above the amount due under what was designated as the "regular rate" in the contract. We are unwilling to believe, however, that the doctrine is not a neutral principle which must be applied even though, as here, it may have the opposite effect.

The "actual facts test" is not a neutral principle because the realities of the unskilled labor market with its potential for abuse to workers, even union represented workers, prompts the "explicit agreement" requirement of the regulations and the cases. The "actual facts" found by the district court, based on union acquiescence and employee ignorance of their rights,[1] contradicts settled law that waiver is not a defense to the Act's national purpose and the public right, sought here to be enforced. The employer can protect himself with an explicit agreement and compliance thereto, but Pepsi admitted at trial that no agreement existed for a daily wage (Comptroller's testimony App. 40) and, therefore, could not meet this burden.

The actual facts in this case are that during the three years in question, so closely did Pepsi control the workers' schedule that Pepsi's expert witness, after examining all the plaintiffs' payroll records (R. 359), could present evidence (plaintiffs' Ex. C and P, R. 561 and 577 attached as appendix hereto) showing Pepsi paid these sixty-three plaintiffs for only 131.08 hours not actually worked. Based on an average salary of $275, this constitutes less than 5¢ per plaintiff per week. For this largess the district court accepted the daily wage and fluctuating workday argument.

---

1. Pepsi did not display a poster required by 29 CFR 5164, advising plaintiffs of their overtime pay rights (R. 23) nor, by agreement, did Pepsi keep time records for Saturday work required by 29 CFR §516.2 (R. 233).

Pepsi has yet to offer an explanation how their payment of "overtime" for less than forty hours is consistent with their claim of paying a daily wage. Nor does Pepsi deny that plaintiffs who work five days ordinarily work longer than forty hours.

Respectfully submitted,

RICHARD KANNER
777 Brickell Avenue
Miami, Florida 33131
Attorney for Plaintiffs

3/11/77	5	37.91		220.00	220.00	Abosaid, M.
3/18/77	5	31.97		220.00	220.00	Abosaid, M.
3/25/77	5	37.89		220.00	220.00	Abosaid, M.
4/1/77	5	36.56		220.00	220.00	Abosaid, M.
4/8/77	5	39.08		220.00	220.00	Abosaid, M.
4/15/77	5	38.96		230.00	230.00	Abosaid, M.
4/6/77	5	39.46		268.00	268.00	Almeida, G.
3/3/76	5	36.46		268.00	268.00	Almeida, G.
4/10/76	5	38.33		268.00	268.00	Almeida, G.
2/5/77	5	39.08		278.00	278.00	Almeida, G.
1/15/77	5	38.68		220.00	220.00	Nuno, A.
1/29/77	5	36.59		220.00	220.00	Nuno, A.
2/10/77	5	33.85		220.00	220.00	Nuno, A.
2/22/77	5	36.83		220.00	220.00	Nuno, A.
3/9/77	5	36.80		230.00	230.00	Nuno, A.
1/18/77	5	34.98		264.00	264.00	Riestra, L.
1/22/77	5	33.49		264.00	264.00	Riestra, L.
1/29/77	5	36.29		264.00	264.00	Riestra, L.
2/6/77	5	37.31		264.00	264.00	Riestra, L.
2/27/77	5	38.68		264.00	264.00	Riestra, L.
3/1/77	5	36.84		264.00	264.00	Riestra, L.

5/20/77	4	30.98	220.00	-44.00	176.00	Abosaid, M.
6/3/77	4	31.07	268.00		268.00	Almeida, G.
7/8/77	4	29.00	268.00		268.00	Almeida, G.
11/25/77	4	31.82	278.00		278.00	Almeida, G.
11/10/76	4	31.38	220.00	-44.00	176.00	Nuno, A.
2/4/77	4	27.34	220.00	-44.00	176.00	Nuno, A.
5/20/77	4	27.78	220.00	-44.00	176.00	Nuno, A.
3/11/77	4	23.20	264.00	-52.80	211.20	Reistra, L.
1/29/77	4	31.75	230.00	-46.00	184.00	Naranjo

4/8/77	3	22.89		268.00	-107.20	160.80	Almeida, G.
2/24/78	3	23.40		230.00	-92.00	138.00	Nuno, A.
1/22/77	3	22.88		220.00	-88.00	132.00	Romano, N.

564

2/25/72	2	15.43		220.00	-132.00	88.00	Nuno, A.

12/1/78	S	37.69	303.00	40		303.00		303.00	Almeida G.
12/3/78	S	37.59	303.00	40		303.00		303.00	Almeida G.
12/7/78	S	38.95	303.00	40		303.00		303.00	Almeida G.
1/1/79	S	38.72	240.00	40		240.00		240.00	Brinson C.
12/26/78	S	38.25	240.00	40		240.00		240.00	Hernandez E.
12/1/78	S	38.39	278.00	40		278.00		278.00	Lopez O.
12/21/78	S	38.70	278.00	40		278.00		278.00	Lopez O.
12/1/78	S	38.11	278.00	40		278.00		278.00	Lopez O.
12/4/78	S	37.92	278.00	40		278.00		278.00	Lopez O
12/15/78	S	37.12	240.00	40		240.00		240.00	Ortega O
12/28/78	S	38.98	278.00	40		278.00		278.00	Riestra L.
1/4/78	S	36.42	240.00	40		240.00		240.00	Romano N.
12/1/78	S	38.88	303.00	40		303.00		303.00	Armenteros
1/4/78	S	37.08	240.00	40		240.00		240.00	Navarro, R.
12/21/78	S	36.98	303.00	40		303.00		303.00	Riestra
12/78	S	36.73	303.00	40		303.00		303.00	Riestra
12/3/79	S	36.22	303.00	40		303.00		303.00	Riestra, L.

29.99

DFT

Filed EX. [illegible]
A.D. 19
Case No

B-25

578

			FWIL								
/6/78	4	3146	240.00	32		8.00	192.00		48.00		240.00	Ortega, O
/16/78	4	3125	240.00	32			192.00				192.00	Ortega O.
125/78	4	3022	240.00	32			192.00				192.00	Romano, N
/8/78	4	2768	240.00	32		8.00	192.00		48.00		240.00	Romano, N

5/9

			PHIL					
1/26/79	3	2233	303.00	24.00		181.80	181.80	Fernandez,
1/14/78	3	2293	230.00	24.00		138.00	138.00	Romano, N.

	TIMECARDS		OT					
	DATE	HRS.	HRS.	DOLS.	SALARY		GROSS	EMPLOYEE LAST
1/14/77	4	44.53	12.53	26.25	220.00	-44.00	202.25	Castro, C.
1/18/77	4	37.47	5.47	14.66	244.00	-48.80	209.86	Castro, C.
12/2/77	4	38.08	6.08	15.18	230.00	-46.00	199.18	Alvarez, A.
1/13/78	4	33.28	1.28	3.57	230.00	-46.00	187.57	Alvarez, A.
1/28/77	4	34.92	2.92	7.48	220.00	-44.00	183.48	Avila, P.
1/21/77	4	39.12	7.12	16.63	220.00	-44.00	192.63	Hernandez, L.
1/28/77	4	35.17	3.17	8.07	220.00	-44.00	184.07	Hernandez, L.
1/8/77	4	38.70	6.70	15.77	220.00	-44.00	191.77	Hernandez, L.
1/29/77	4	36.03	4.03	10.08	220.00	-44.00	186.08	Hernandez, L.
5/6/77	4	41.88	9.98	21.78	220.00	-44.00	197.78	Riqual, A.L.
1/23/77	4	37.00	5.00	12.79	230.00	-46.00	196.79	Riqual, A.L
1/6/78	4	35.82	3.82	10.03	230.00	-46.00	194.03	Riqual, A.L
3/8/76	3	25.69	1.69	4.47	220.00	-88.00	136.47	Avila, P.
1/1/77	3	27.99	3.99	9.99	220.00	-88.00	141.99	Hernandez, L.
12/22/77	2	17.41	1.41	3.74	220.00	-132.00	91.74	Hernandez, L.
1/18/77	2	23.89	7.89	22.91	278.00	-166.80	134.11	Marshall, L.J.